

IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 62 OF 1999.

1. Mrs. Mariana Carmelina Fernandes,
major, wife of late Mr. Caetaninho
Fernandes, major, housewife;
and her daughter:
 2. Miss Idalina Fernandes,
major, daughter of late
Mr. Caetaninho Fernandes,
resident of House No.380,
Tonwaddo, Betalbatim,
Salcete, Goa.
 3. Shri John Dias alias
Anthony Pelegrino Dias,
husband of Idalina Fernandes, alias
Ida Fernandes alias Mariana Fernandes,
resident of House No.380,
Tonvaddo, Betalbatim, Salcete, Goa.
- Appellants.

Versus

1. Mr. Antonio Gomes,
son of late Mr. Joaquim Maximiano
Teodonida Gomes, major,
Electrician, and his wife:
2. Mrs. Benjamina Nicaline Fernandes,
wife of Mr. Antonio Gomes, major,
both residents of H No. 466,
Opp. Chapel, Dongri-Navelim,
Salcete, Goa.
3. Mrs. Magdalena Fernandes,
major, wife of Mr. Antonio Francisco
Fernandes, housewife and her
husband ;
4. Mr. Antonio Francisco Fernandes,
major, service, both residents of
Behind St. Lorenz Chapel,
Arrosim, Cansaulim, Salcete, Goa.
5. Mr. Agnelo Leitao,
son of late Mr. Aleixo Mariano
Leitao, major, driver, resident of
House No. 383;

6. Miss Luiza Ezabela Leitao,
daughter of late Mr. Aleixo
Mariano Leitao, spinster, major,
resident of House No.383; and
 7. Miss Lourdina Leitao,
daughter of late Mr. Aleixo Mariano
Leitao, spinster, major, all residents of
H. No. 383, Monddo, Benaullim,
Salcete, Goa.
 8. Mrs. Christalina Fernandes,
wife of Mr. Joao Santana Fernandes,
major, housewife and her husband:
 9. Mr. Joao Santana Fernandes,
son of Mr. Jose Camilo Fernandes,
Toddy Tapper, major,
Both residents of Tonvaddo,
Betabtim, Salcete, Goa.
 10. Mrs. Alene Fernandes, wife of
Mr. Anthony S. Fernandes,
major, and her husband
 11. Mr. Anthony S. Fernandes;
(expired):-
 - A. Franco Rosario Fernandes,
r/o A2, 77 Sapna Residency,
Per Seraulim, Colva, Salcete.
 - B. Lexcia Fernandes.
 - C. Glen Anthony Sequeira,
3, Catherine Village,
1st Domnic Colony, Orlem,
Malad, Bombay – 64.
- Respondents.

Shri M. P. Almeida, Advocate for the Appellants.

Shri M. S. Usgaonkar, Senior Advocate with Shri Sudesh Usgaonkar,
Advocate for the Respondents No.1 to 10 and L.Rs. of Respondent No.11 (A,
B and C).

CORAM: R.M.S. KHANDEPARKAR, J.

DATE : 20th JANUARY, 2006.

ORAL JUDGMENT :

This appeal arises from the Order dated 30th August, 1999 passed by the Comarca Judge of Salcete and Quepem in Inventory Proceedings No. 99/97. By the impugned order, the learned Judge has declared the deed of gift dated 16th August, 1976 executed by Smt. Maria Luzia Trindade Isabel Rebelo in favour of Miss Ida Fernandes to be null and void.

2. Few facts relevant for the decision in the matter are that one Pedro Camilo Fernandes was married to Smt. Maria Luzia Trindade Isabel Rodrigues who had six children by name Benjamina, Mariana, Magdalena, Idalina, Cristalina and Alena. The said Pedro Camilo expired on 20th January, 1975. Likewise the husband of Mariana also expired leaving behind him his widow and his moiety holder said Mariana and said Idalina alias Ida Fernandes. The widow of Pedro Camilo Fernandes namely Maria Luzia Trindade Isabel executed a gift deed on 16th August, 1976 in favour of her granddaughter Ms. Idalina alias Ida reserving to herself the lifetime usufruct of the disposable share in the gifted properties. The gift was stated to be on account of her disposable share (cota disponivel) and enumerated five different properties namely 1/24 and 1/16 part of the property known as "Accona Gally" or "Chaul" situated at Calata, Majorda, half of the property "Nagano Udego" - Registration No. 14848, half of

property “Nagano Udego” - Registration No. 17416, half of property “Addo or Vaddo Vulgo Sondiem” and property “ Urbano “. The said Maria Luzia expired on 4th April, 1985. Cristalina Fernandes, one of the legal heirs of Pedro and Maria Luzia instituted Inventory proceedings in the Court of Comarca of Salcete and Quepem in the year 1997. The Administrator appointed in the proceedings filed their list of assets for the purpose of disposition thereof in accordance with the provisions of law applicable to the Inventory proceedings. In the said Inventory proceedings, Cristalina filed an application dated 9th November, 1998 praying that a declaration be issued that the Gift deed dated 16th August, 1976 executed in favour of Ida Fernandes be declared as null and void. The said application was contested by the appellants and after hearing the parties, the impugned order came to be passed allowing the said application. Hence the present appeal.

3. Placing reliance in the decision of this Court in the case of ***Jose Antonio Philip Pascoal da Piedade Ciriolo dos Milagres Miranda v. Joao Luis Laurente dos Milagres Miranda and others*** reported in 1999 (1) Goa L.T. 77, the learned Advocate for the appellants submitted that the Comarca Court could not have declared the entire Gift deed null and void though in view of the said decision in Jose Miranda's case, the Court could have very well taken into consideration the said gift to be of disposable

quota of the donor in the properties. The Court below having failed to consider the same, has failed to exercise its jurisdiction, rendering the impugned Order to be bad in law. Further relying upon the decision of the Apex Court in *F. M. Devaru Ganapathi Bhat v. Prabhakar Ganapathi Bhat* reported in (2004) 2 S.C.C. 504, the learned Advocate for the appellants has stated that the intention of the donor has to be understood by reading the entire Gift deed as a whole and having so read the Gift deed dated 16th August, 1976, would reveal that it was in fact the gift of the donor's disposable share and not of any specific property as such and even though the properties are enumerated in the Schedule appended to the Gift deed, the Gift deed could have been read excluding the said Schedule and having so read, there would have been no occasion for the Comarca Court to declare the entire deed to be null and void.

4. The learned Senior Counsel appearing for the respondents, on the other hand, submitted that if the Gift deed is read with the exclusion of the specified properties, it would virtually mean a gift of disposable half share which is not permissible under the law. According to the learned Senior Counsel, the subject matter of the gift deed has to be an existing property and that is the import of Art. 1452 of the Portuguese Civil Code. Further referring to Article 1790 of the Code, he submitted that it clearly specifies that the calculation of the disposable quota is to be pursuant to the death of

the holder of the properties.

5. Learned Advocate for the appellants has also drawn attention to Article 1784 to contend that the disposable share can be disposed of by the party at any stage and merely because the calculation of disposable share is deferred till the death of the party, that could not have prohibited the deceased Maria from disposing her disposable quota.

6. Upon hearing the arguments on behalf of the parties and on perusal of the records, the point for consideration which arises is whether the Gift deed dated 16th August, 1976 is a valid and lawful document which can be given effect to.

7. The relevant and operative portion of the Gift deed dated 16th August, 1976 reads thus :-

“That in pursuance of the said intention ad in consideration of natural love and affection which the said DONOR has for the said DONEE, the said DONOR out of her free will without fraud, coercion or undue influence from any body whosoever, and in full possession of her

senses does hereby transfer and convey by way of gift to the said DONEE, properties more particularly described in the Schedule below, with all rights, title and interest, privilege, appurtenances, easements and ways and all other rights whatsoever thereto TO HOLD AND HAVE the same. ”

8. The relevant portion of the Gift deed quoted above, on plain reading thereof, would reveal that under the said deed the donor has sought to transfer and convey by way of gift all the properties described in the Schedule appended to the said deed. Except the properties described in the Schedule, the deed does not refer to any other subject matter of transfer by way of gift. The deed essentially and exclusively refers to transfer of specified properties. The contention of the learned Advocate for the appellants, however, is that the real intention of the donor in relation to transfer of properties is to be ascertained by reading the entire document and not merely the operative portion of the deed and in that connection, attention is drawn to the third para of preface portion of the deed which reads thus :-

“ AND WHEREAS, the Donor
is desirous of gifting the half of the said

Properties (Quota Disponivel) on account of her disposable shares to the Donee, in consideration of the affection and natural love for the DONEE in the manner hereinafter appearing: reserving, however, the life interests (usufruto vitalicio) of the same half of the properties. The said half share to the properties is now, being evaluated in the Margao Civil Court, under Inventario proceedings No. 18940 of 1976.”

9. The proposition that in order to understand the intention of the parties, one has to read the entire document cannot be found fault with. However, the question of ascertaining the intention of the parties can arise only when the document is vague or there is any ambiguity about the actual transaction disclosed from the deed. The proposition of law that when there is no ambiguity in the document, question of intendment is immaterial is well settled (vide *Her Highness Maharani Shantidevi P. Gaikwad v. Savjibhai Haribhai Patel and others* reported in AIR 2001 SC 1462 = (2001) 5 SCC 101). Once the deed discloses with sufficient clarity that it is a transfer by way of gift of specified properties, the question of

ascertaining the intention of the donor does not arise. Even otherwise and assuming that the intention of the party is to be considered, what can be gathered from the preface quoted above is that the gift contemplated under the deed is of the half share in the specified properties on account of disposable share of the Donor and not that the gift itself is of disposable share as is sought to be argued on behalf of the appellants. Being so, even considering the intention of the Donor as such, by no stretch of imagination it can be held that it is a gift of any disposable quota as such as is otherwise contended on behalf of the appellants.

10. It is also to be noted that the question of transfer of disposable quota by itself cannot arise. Disposable quota is a right in favour of a party to transfer half share in the property. In the case in hand admittedly no disposable quota of the donor with reference to the properties gifted in the deed was ascertained on or prior to the date of execution of the deed. It was only after ascertaining such quota that the donor could have gifted the same. In order to enable a party to transfer something by way of gift, it has to be an existing property. In terms of Article 1452 Gift is a contract by which a person transfers to another gratuitously a part or totality of present properties. Article 1453 of the Code provides that the gift shall not include properties in future and the Sole Paragraph to the said provision specifies that future property means those, which are not

existing in possession of the donor, or to which he has no right at the time of making the gift. Similarly Section 122 of the Transfer of Property Act defines gift to mean the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void. Section 124 of the Transfer of Property Act provides that gift comprising both existing and future property is void as to the latter.

11. It is not in dispute that a moiety holder cannot execute Gift deed in respect of the specific properties which are subject matter of inventory proceedings in the absence of consent of all the legal heirs of the deceased on whose death the Inventory proceedings are instituted. The law on this aspect, in fact, is sufficiently discussed in *Jose Miranda v. Joao Mirand's case* and need not be reconsidered or elaborately discussed herein. Considering the same therefore no fault can be found with the order of the trial Court declaring the deed null and void.

12. Considering the provisions of law referred to above and simultaneously reading Gift deed in question, it would therefore reveal that it is entirely a gift in relation to the specific properties. Once the properties listed therein are excluded, there remains nothing therein which could be gathered as having been gifted to the donee by the donor.

13. The decision of the Apex Court in the case of *F.M. Devaru Bhat v. Prabhakar Bhat (supra)* is of no help to the appellants in the case in hand. The Apex Court therein has held that :-

“ The rule of construction is well settled that the intention of the executor of a document is to be ascertained after considering all the words in their ordinary natural sense. The document is required to be read as a whole to ascertain the intention of the executant. It is also necessary to take into account the circumstances under which any particular words may have been used. ”

In the said case the party had disputed the claim in respect of partition of certain properties and in that context the true construction of

the gift deed in relation to certain properties was the subject matter of dispute and in that context the Apex Court had ruled as above. Therein the validity of the gift deed was not in question, but the construction of the gift deed itself was the subject matter of dispute. That is not the case in the matter in hand. Herein the entire gift deed is sought to be challenged on the ground that the donor was not entitled to gift the properties which were subject matter of the gift deed as she had not acquired exclusive half share in any of the properties listed in the gift deed. The ruling cannot be understood de hors the facts of the case. The sentences from any judgment whether by the Apex Court or the High Court, cannot be read in isolation nor like the statutes, as has been repeatedly held by the Apex Court. In the facts of the case in hand, therefore, the ruling of the Apex Court in *Devaru G. Bhat's case* is of no help to the appellants.

14. In the result, therefore, the appeal fails and stands dismissed with no order as to costs.

R. M. S. KHANDEPARKAR, J.

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